

86-884

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

**JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH
SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Are fourth amendment rights violated when the police make an arrest for a minor misdemeanor, absent any exigent circumstances, on the uncorroborated allegations of a supermarket guard where the arresting officers (1) refused to interview available witnesses, (2) conducted no independent investigation, (3) never knew the guard or otherwise established his reliability, and (4) repeatedly refused or declined to hear the petitioner's version of the dispute when he denied the guard's allegations?

2. Has a private supermarket engaged in "state action" in violation of 42 U.S.C. Section 1983 where it knowingly engages in a customary plan or working agreement with the local police

(a) whereby the police allow the attesting of the necessary signatures to a store form-complaint out of the presence of the authorized state official in violation of state law and cause the perjurious document to be filed in the state court to initiate criminal charges, and/or

(b) whereby the police, without independent investigation or probable cause, will arrest anyone the store detains for shoplifting and designates for arrest?

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INTERVIEW THE ACCUSED, AND DECLINED TO CONDUCT ANY INDEPENDENT INVESTIGATION PRIOR TO ARREST.

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**PETITION FOR A WRIT OF CERTIORARI
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The petitioner James N. Gramenos respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on July 25, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported in 797 F.2d 432, and is reprinted in the Appendix hereto, App. p. 1.

The memorandum decision of the United States District Magistrate, as adopted by the United States District Court for the Northern District of Illinois, has not been reported. It is reprinted in the Appendix hereto, App. p. 21. The order of the district court granting respondents' motion for summary judgment and adopting the report and recommendation of the magistrate is reprinted in the Appendix hereto, App. p. 20.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Sec. 1983, the petitioner brought this suit in the Northern District of Illinois on February 11, 1981. On September 11, 1985, the district court granted the respondents' motions for summary judgment. (App. 20).

On petitioner's appeal, the Seventh Circuit on July 25, 1986, entered a judgment and an opinion affirming the orders, except that portion granting summary judgment on the claim of excessive detention which was vacated and remanded to the district court for further proceedings. (App. 1, 17).

The petitioner filed a timely petition for rehearing and suggestion of rehearing en banc which was denied on August 29, 1986. (App. 19). The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

ILLINOIS STATUTES INVOLVED

Ill. Rev. Stat., ch. 38, Sec. 32-6. *Performance of Unauthorized Acts.* A person who performs any of the following acts, knowing that his performance is not authorized by law, commits a Class 4 felony: (pertinent text reads) . . . (b) Acknowledges the execution of any document which by law may be recorded; . . .

Ill. Rev. Stat., ch. 38, Sec. 107-2. *Arrest by Peace Officer.* (The pertinent text reads): . . . A peace officer may arrest a person when: (c) He has reasonable grounds to believe that the person is committing or has committed an offense.

Ill. Rev. Stat., ch. 38, Sec. 107-6. *Release by Officer of Person Arrested.* A peace officer who arrests a person without a warrant is authorized to release the person without requiring him to appear before a court when the officer is satisfied that there are no grounds for criminal complaint against the person arrested.

Ill. Rev. Stat., ch. 38, Sec. 107-14. *Temporary Questioning Without Arrest.* A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense as defined in Section 102.15 of this Code, and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.

Ill. Rev. Stat., ch. 38, Sec. 111-3. *Form of Charge.* (The pertinent text reads): . . . (b) An indictment shall be

signed by the foreman of the Grand Jury and an information shall be signed by the State's Attorney and sworn to by him or another. A complaint shall be sworn to and signed by the complainant. . . .

Ill. Rev. Stat., ch. 110, Oaths and Affirmations. (The pertinent text reads): . . . *Perjury.* Sec. 5. All oaths, affirmations, affidavits and depositions, administered or taken as provided in this act, shall subject any person who shall so swear or affirm willfully and falsely, in matter material to any issue or point in question, to like pains and penalties as are inflicted by law on persons convicted of willful and corrupt perjury.

STATEMENT OF THE CASE

(a) Record In The District Court And Seventh Circuit Action.

In a Section 1983 action, the Seventh Circuit affirmed the district court's grant of summary judgment as to all issues except the prolonged detention and incarceration of the petitioner, remanding that issue to the district court for further proceedings. (App. 17). The jurisdiction of the district court was invoked in a civil action for unlawful arrest and the deprivation of rights under 42 U.S.C. Sec. 1983, and under 28 U.S.C. Sec. 1331.

Petitioner alleged that he was arrested by respondent police without probable cause and prosecuted for retail theft, a misdemeanor, on the uncorroborated allegations of a private security guard while petitioner was shopping in respondent's supermarket. (R. 24). Officer Cosgrove testified that the customary procedure was that if any Jewel

guard had detained a person for suspected shoplifting, and had signed a Jewel form-complaint requesting the police to arrest, then "the arrests are made on the basis of the Complaints." (R. 32, para. 9, affidavit) (R. 94-R, pp. 18, 20-21, 46, Officer Cosgrove deposition). The Jewel form-complaint was a machine copy all-purpose form, modified by Jewel from the state court document provided to them by the police of the 18th District. (R. 94-V, pp. 37-40) (See App. 29).

Respondent Vaughn also deposed that this was "standard operating procedure", as established by Jewel corporate headquarters and the Chicago police. (R. 94-V, pp. 42-43). He deposed that the Jewel form-complaint was used as the company's "arrest report." *Id.* at 37-40.

Petitioner also alleged that he was unlawfully incarcerated at the 18th District police station cell for an excessive time, without being allowed his release on \$100 bail. The Seventh Circuit agreed the detention was excessive and possibly imposed under improper motive. (App. 7). On the detention issue, it vacated the summary judgment and remanded the case for further proceedings. (App. 17).

The district court, citing authorities from the Eighth and Fifth Circuits, agreed with petitioner's theory of the case stating that "Courts have found state action when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments." (App. 26). The district court ruled that since the police in the instant case *did* conduct an independent investigation, that fact defeated petitioner's Sec. 1983 action alleging state action on the part of Jewel, and granted respondents' motions for summary judgment. (App. 21-27).

On appeal, the Seventh Circuit affirmed the judgment of the district court on several issues, but it did so only

after agreeing with the petitioner that in fact the verified record did *not* show independent investigation by the police officers. (App. 9). However, the Seventh Circuit affirmed the summary judgment on the issue of unlawful arrest holding that an independent investigation was not required to establish probable cause.

The Seventh Circuit, relying upon *dicta* from a 1974 Illinois Appellate Court case, stated, "In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest." (App. 11-12). It also added a new proposition of law (App. 13):

"Police have reasonable grounds to believe a guard at a supermarket. We need not say that police are entitled to act on the complaint of an eyewitness; a guard is not just any eyewitness."

In this case, the verified record shows supermarket guard Vaughn to have been a ~~part-time~~ employee of Jewel for several months prior to the petitioner's arrest. Vaughn testified that he had a criminal conviction record. (R. 94-V, pp. 43-45, 55).

Using the above standards, the Seventh Circuit ruled that this Honorable Court in *Illinois v. Gates* overruled *Aguilar v. Texas* and *Spinelli v. United States* "in favor of a lower standard of probable cause." (App. 10-13). The Seventh Circuit reasoned that since "The Court has never suggested that the police, with such information in hand, must conduct a further investigation," there was no reason for independent investigation in petitioner's case. (App. 13).

As to the credibility of the supermarket guard, the Seventh Circuit acknowledged that the respondent officers had not personally known the respondent Jewel guard prior to this incident. (App. 6, 10, 13).

(b) **Petitioner's Encounter At The Respondent Jewel Supermarket.**

The dispute in this case arose when petitioner was accosted at a Jewel food store in Chicago, Illinois by respondent supermarket guard Johnny Vaughn. On February 12, 1980, petitioner was shopping on the premises of the respondent's retail supermarket. While petitioner was waiting in the checkout line, shortly before closing time, he removed a *People* magazine from a rack located adjacent to the checkout counter, paged through the publication, and returned the magazine to the rack. (R. 94-V, pp. 28-29).

Petitioner paid for his purchases and was confronted by respondent Vaughn, who did not speak or identify himself to the petitioner. *Id.* at 36-43. From prior personal experiences in that store petitioner believed that this person was a troublemaker unrelated to the store, involved in pilfering food, selling narcotics, or demanding money from shoppers. *Id.* at 43-44.

The petitioner requested the store cashier, who had just handled the money transaction with the petitioner, to summon a store manager. *Id.* at 45. Vaughn, without speaking, knocked several tubes of toothpaste off of the store's shelves, onto the aisle of the store, in full view of the cashier and other shoppers waiting in the checkout line. *Id.* at 51-52. Petitioner walked up to an individual in the shopping area of the store that he believed to be a supervisory employee and asked to speak to him. *Id.* at 53. However, Vaughn would not allow petitioner to speak to this man and announced in a loud voice that petitioner was under arrest. *Id.* at 53.

Respondent Vaughn forcefully pushed and shoved the petitioner into a back room security office with the assist-

ance of the black man the petitioner had mistaken for a store supervisor. *Id.* at 55. This individual was identified by Vaughn only as an "off-duty Chicago police officer." (R. 94-P, p. 25, state court transcript). Vaughn, in the presence of the off-duty Chicago police officer, told petitioner that he just wanted to talk to him. Upon arriving in the back room Vaughn demanded of petitioner that "you (petitioner) better have some money or you're going to jail." (R. 94-U, pp. 56-57) (R. 94-B, p. 5).

The store manager, Tinkovitch, who had witnessed the encounter in the shopping area of the store, entered the room and remained there throughout the confrontation in the security office attempting to resolve the dispute. (R. 94-T, pp. 27-36) (R. 94-U, pp. 68-69). The petitioner was searched but no store merchandise was found. (R. 94-T, pp. 27-36, store manager's deposition).

An unidentified Jewel Company stockboy entered the room and placed two tubes of *Gleem* toothpaste and a package of *D-Zerta* gelatin on the desk next to Vaughn. *Id.* To settle the dispute, Vaughn then demanded that the petitioner purchase the toothpaste and gelatin products the stockboy had brought into the room. (R. 94-U, p. 59). Petitioner refused respondent Vaughn's offer, stating that neither he nor his family used that brand of toothpaste or the gelatin product. *Id.* at 59, 64-65.

The following day, petitioner returned to the store and spoke to store manager Tinkovitch requesting permission to interview the cashier who waited on petitioner the previous evening, and any other store employees who witnessed the events. (R. 94-B, pp. 5-6) (R. 94-U, pp. 102-04) (R. 94-T, pp. 41-42). The store manager and security guard personnel refused the petitioner's request, and further refused to provide him with the names of the cashier and

other employees who were on duty when petitioner was ordered arrested by the Jewel. *Id.* The store manager, in his own handwriting, signed a memorandum on a store form stating that he was refusing petitioner's requests to either interview or otherwise identify persons who witnessed the activity concerning petitioner's arrest at the Jewel store.

(c) Police Failed To Speak To The Store Manager Or Other Witnesses Concerning The Improbability Of The Supermarket Guard's Allegations.

The store manager was never interviewed by the police. He deposed that his observations of the dispute between petitioner and respondent Vaughn, the supermarket guard, showed a high probability that the merchandise that guard Vaughn was attempting to attribute to the petitioner was unjustified. (R. 94-T, pp. 29-32). The supermarket guard deposed that he had brought the merchandise, which he had accused petitioner of attempting to steal, into the security room. (R. 94-V, pp. 85-87). The store manager deposed that this was not true.

The verified record shows that the store manager contradicted the respondent guard's allegations. The store manager deposed that he had observed the confrontation between petitioner and guard Vaughn in the shopping area of the store and specifically looked for but did not see any merchandise, either in the petitioner's or guard Vaughn's possession. (R. 94-T, pp. 17-20, 26-36). Instead, the store manager deposed that he had heard guard Vaughn instruct the store's stockboys to look through the store aisles and bring some merchandise into the security room without identifying what items the employees were to recover. *Id.* at 35-36.

The store manager deposed that it was not unusual to find things out of place throughout the aisles in the store, and that he personally picked up items which had been discarded by shoppers from the floor nearly every hour of the day. *Id.* at 30-31.

The police never interviewed the store manager, or other witnesses who would have been material witnesses as to the issue of probable cause to arrest. The Seventh Circuit said that in this misdemeanor case the police "may have exercised poor judgment" but held (App. 17):

"We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices."

(d) The Arrest By Police.

When petitioner refused to accede to the Jewel security guard's demand to settle the dispute by paying approximately \$3.00 to Vaughn, the security guard telephoned the police by calling the "911 emergency" number. (R. 94-P, p. 10) (R. 94-U, p. 60). Officers Cosgrove and Schmit, the respondents in this case, were in their squad car and received a radio call that "Jewel was holding a shoplifter for the police" and immediately proceeded to the supermarket. (R. 32, police affidavits).

At 11:55 p.m., minutes before the midnight closing hour, Officers Cosgrove and Schmit entered the back room security office and found assembled the petitioner, the store guard Vaughn, the store manager, Tinkovitch, and the off-duty Chicago police officer. (R. 94-P, p. 25) (R. 24, para. 18) (R. 94-U, pp. 55-62).

Without any verbal accusation of theft or other crime, Vaughn exhibited the store merchandise and told the police that the petitioner had refused to pay or cooperate. *Id.* Vaughn handed the police a copy of the Jewel all-purpose criminal complaint-form maintained on a clipboard in the Jewel security office. (R. 38) (App. 29 is an exact copy utilized by respondents against the petitioner in this case) (R. 94-U, pp. 68-69). In deposition, Vaughn agreed that he did not have any conversation with the police in the security office (R. 94-V, p. 96).

Moments later, another unidentified stockboy entered the back room and placed a jar of baby food next to the toothpaste and *D-Zerta* gelatin which a stockboy had previously brought into the room prior to the arrival of the police officers. (R. 94-U, pp. 61-63).

Officer Cosgrove demanded that petitioner produce his driver's license. Without asking petitioner any questions, Officer Cosgrove searched the petitioner and prepared to handcuff him. Petitioner told the police that "you can't do this, I want you to talk to witnesses and get my side of the story. I am an assistant public defender, I am a lawyer." *Id.* at 66. Officer Cosgrove responded by stating "then you know you don't have to talk to us." *Id.* at 66-67.

Petitioner told Officer Cosgrove that (1) he wanted to relate his version of what occurred to the police concerning the encounter, and (2) he asked the police respondents to speak to the store cashier, and other people still on the store premises who had witnessed the events. *Id.* at 66-68. Officer Cosgrove told the petitioner he would not and immediately handcuffed the petitioner and proceeded to take him out of the security office. (R. 94-B, p. 7, petitioner's affidavit).

While handcuffed, and being taken toward the exit door of the market, petitioner asked the police if they would get the names of the shoppers who were still in the store, and the names of the cashier and store employees who witnessed the events. *Id.* The time was midnight and the store was closed. (R. 94-T, pp. 39-40). The police refused the request and took petitioner to the police car. The petitioner requested that a supervisory police official be called to the scene to assess the facts and resolve whether or not the petitioner should be further detained. (R. 94-U, p. 71). The police pushed and shoved the petitioner into the rear seat of the police car and transported him to the 18th District station located four blocks from the supermarket. *Id.* At the 18th District police station the respondents refused to allow the petitioner to be interviewed by police, detectives, or state's attorney personnel concerning his version of the events. The respondent police officers, Schmit and Heatley said that petitioner would be incarcerated for four hours. (R. 24, para. 1, 7) (R. 94-U, pp. 77-88) (R. 94-B, p. 11, petitioner's affidavit). The petitioner was placed in a jail cell until 4:15 a.m. without being allowed to post \$100 bond to effect his release. (R. 94-U, pp. 73-83, 84-100).

(e) Criminal Proceedings In The State Court.

On March 24, 1980, petitioner was prosecuted on the basis of the respondent Jewel's all-purpose criminal complaint-form. (See copy, App. 29). Following the state's case-in-chief, with respondent Vaughn being the only prosecution witness to appear in court, the state trial judge entered a finding of not guilty. (R. 94-P, p. 31).

Despite the acquittal, petitioner suffered grievous losses in his law practice and health, as well as continued losses to his professional and personal reputation.

(f) Section 1983 Complaint.

Petitioner instituted this civil rights damage action pursuant to 42 U.S.C. Section 1983. The complaint alleged that respondents had acted in furtherance of a "concerted and customary plan" whereby Jewel (supermarket) was illegally permitted by the 18th District Chicago police, including the respondent police officers, to cause the arrest and prosecution of persons whom Jewel agents designated as shoplifters, without establishing probable cause as is required by the fourth and fourteenth amendments to the Constitution. (R. 24).

The complaint also alleges that the arrest and prosecution of petitioner by respondents, was without probable cause, and based solely on the submission of a form-complaint given to them by Jewel supermarket guard Johnny Vaughn. (R. 24, para. 3). The respondent arresting police officers, in their answer to petitioner's amended complaint, admitted that the arrest of petitioner was based solely on the respondent supermarket's criminal complaint. (R. 43, para. 4).

Illinois law mandates that a criminal complaint be sworn. *Ill. Rev. Stat.*, ch. 38, Sec. 111-3(b). Petitioner's amended complaint alleges that the criminal complaint processes used against the petitioner by respondents to arrest and prosecute him were in violation of various state felony statutes.

Illinois law mandates that a criminal complaint be sworn. *Ill. Rev. Stat.*, ch. 38, Sec. 111-3(b). The amended complaint alleged that the respondent police officers and Jewel engaged in a customary plan or agreement, which if true, would subject them to felony convictions, for violating the state law in executing the criminal complaint against the petitioner. (R. 24, Count I & II, para. 8-10,

13-14, Count II, para. 19-22). The Seventh Circuit agreed that the Jewel criminal complaint was not properly sworn and that Sgt. Heatley and Jewel falsely executed the court document. (App. 2). The Seventh Circuit said, "We will assume that the procedure of attesting the signature out of the presence of the witness violates state law." (App. 2).

Petitioner alleged in his amended complaint that the illegal execution of the Jewel form-complaint and the method by which it was used against the petitioner was in violation of his fourth and fourteenth amendment rights; that the filing and recording of this illegally executed court document was violative of petitioner's rights to due process of law and actionable under 42 U.S.C. Sec. 1983.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS ARRESTED BY THE POLICE WITHOUT A WARRANT FOR MISDEMEANOR RETAIL THEFT ON THE UNCORROBORATED ALLEGATIONS OF A SUPERMARKET SECURITY GUARD WHERE THE ARRESTING OFFICERS DECLINED TO INTERVIEW AVAILABLE WITNESSES, DECLINED TO INTERVIEW THE ACCUSED, AND DECLINED TO CONDUCT ANY INDEPENDENT INVESTIGATION PRIOR TO ARREST.

THE JUDGMENT OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT, THREE OTHER FEDERAL CIRCUITS, AND THE STATE OF ILLINOIS.

In the case at bar the Seventh Circuit created a new standard for probable cause and a new exception to it for

allegations made by private security guards. The Seventh Circuit held that probable cause to make a warrantless arrest in a misdemeanor case was established by the uncorroborated allegations of a supermarket guard, and that the police were not required to interview witnesses who were on the scene, nor to interview the accused to obtain his version of the facts.

This ruling is contrary to decisions of other circuit courts that have ruled on this issue, contrary to prior decisions of the Seventh Circuit itself, contrary to decisions of this Honorable Court, and contrary to the law of the State of Illinois.

A. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of The Fifth, Eighth And Tenth Circuits.

The decision of the Seventh Circuit at bar is in direct conflict with the decision of the Fifth Circuit in *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977), where the court failed to find probable cause in a similar situation. In that case Duriso had been shopping in K-Mart, a discount merchandise store. The assistant manager accused him of leaving the store without paying for several packs of cigarettes. The police were called. They searched Duriso and found nothing. They then arrested him, pursuant to a form-complaint signed by the assistant store manager, charging him with petty theft. After his criminal charges were dismissed, Duriso filed suit under Section 1983, and was awarded damages by a jury. The Fifth Circuit affirmed, holding that the police lacked probable cause to arrest.

In the case at bar, the police had no more information than the police had in the *Duriso* case. No merchandise was found on the petitioner's person. A form-complaint signed by the store security guard was the sole basis for

the arrest, and neither the petitioner nor any other available witnesses were interviewed by the police prior to arrest. Under these circumstances, although the Seventh Circuit found probable cause, it is clear that the Fifth Circuit would not have done so under the authority of *Duriso*.

Similarly, in *Smith v. Brookshire*, 519 F.2d 93 (5th Cir. 1975) the Fifth Circuit found no probable cause when shoppers were arrested solely at the request of store employees. Plaintiffs were shopping for groceries in Brookshire Bros., a food store in Texas, when they were accused of stealing a jar of cold cream. The police were summoned, and they arrested the shoppers on the basis of the store manager's statements. The charges were later dismissed, and the shoppers filed suit under Section 1983. In awarding damages to the plaintiffs, the district court held that there was no reasonable grounds to detain the shoppers. In affirming, the circuit court stated:

"In sum, the police had detained the appellees without independently establishing that there was probable cause to do so. . . . Instead, they depended on the conclusory assessment of the store officers." 519 F.2d 93, 94.

Clearly then, there is a conflict between the Fifth Circuit and the Seventh Circuit as to whether the uncorroborated statement of a merchant's employee, without more, will suffice for probable cause.

The Tenth Circuit also disagrees with the Seventh Circuit on this issue and agrees with the Fifth Circuit. In *Lusby v. T.G.&Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *cert. granted and judgment vacated* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986). Lusby was accused of not paying for a pair of sunglasses by a private security guard employed by the store. The police were

called, and they arrested Lusby and his brothers without conducting any independent investigation to determine whether probable cause existed. They failed to interview any other store employees, such as the cashier, or other witnesses in the store who might have been able to corroborate or contradict the security guard's allegations.

In an action for damages pursuant to Section 1983, the jury found in favor of the Lusbys. In affirming, the Tenth Circuit noted that the jury had been instructed in the elements of probable cause and therefore could conclude that a reasonable police officer would have known he was violating Lusby's rights. *Accord, El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980) (allegation of unlawful arrest by police following detention by store security guards constitutes facts sufficient to state a claim under Sec. 1983. Summary dismissal was improper).

B. The Decision At Bar Is In Conflict With Prior Decisions Of The Seventh Circuit.

In *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985) there was a dispute over a restaurant bill. Six diners were arrested by the police at the request of the restaurant owner and charged with theft. The police were criticized by the Seventh Circuit for failing to independently investigate the case, and for arresting the diners without hearing their version of what occurred at the restaurant. The district court had relied on a line of cases which held that information supplied by a citizen informer regarding an alleged crime was sufficient to establish probable cause. In *Moore* the Seventh Circuit rejected the applicability of those cases to this situation, noting that those cases were all felony cases, and this was a misdemeanor case. The court stated, "There was neither a threat to the officers' safety, nor a large amount of

money involved in dispute, nor any serious crime committed." 754 F.2d 1336, 1345 (7th Cir. 1985). Therefore, the police "could not have thought that they had to strike swiftly to protect the public safety." 754 F.2d 1336, 1357.

Similarly, in the case at bar, petitioner was charged with a minor misdemeanor, the amount in dispute being less than \$4.00, and the police arrested petitioner at the request of the supermarket guard. There was neither a threat to the officer's safety, nor a large amount of money involved, nor any serious crime committed. Yet, the police refused to allow the petitioner an opportunity to tell his version of what occurred, nor did they interview the store manager or other available witnesses. Clearly, under the *Moore* test probable cause for arrest was not established in the petitioner's case.

In an earlier case, *Butler v. Goldblatt Bros. Inc.*, 589 F.2d 323 (7th Cir. 1978) the Seventh Circuit had also stressed the importance of independent investigation in the determination of whether or not there was probable cause. In *Butler*, an informant working as an undercover agent for Goldblatt Bros., informed their security department that a security guard who was to testify in court was the subject of a murder plot. The Goldblatt security director called the police and told them of the plot, without divulging the name of the informer. On the day of the court hearing, the subject security guard notified the police that he had been threatened in the courtroom by a Mr. Lewis. Lewis and his companions were arrested by the police and held in detention for up to fifteen hours before they were released. Lewis and his companions then filed suit under Section 1983 and for false arrest under state law.

In analyzing whether the police had probable cause for the warrantless arrests, the Seventh Circuit stated,

"the officers had probable cause [if] . . . at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the [Goldblatt] employees had committed or [were] committing an offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964)." 589 F.2d at 325.

The Seventh Circuit continued its analysis by stating that the determination of probable cause would hinge on the weight to be given the information supplied by the informant. That weight, however, could only be determined after an assessment of the informer's credibility and the reliability of his information. With respect to the reliability of information received from the informant, the Seventh Circuit concluded,

"it is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations . . . a reasonable man could not find that the arrests were based upon probable cause." 589 F.2d at 325-326.

Thus, it is clear that the decision at bar not only conflicts with decisions of other circuits, but even conflicts with prior Seventh Circuit cases in its failure to require independent investigation by the police in minor misdemeanor cases as a prerequisite for probable cause.

C. The Decision At Bar Conflicts With Decisions Of This Honorable Court Inasmuch As The Seventh Circuit Employs A Lower Standard Of Probable Cause To Validate Petitioner's Arrest.

The standard applied by this Court in determining whether there is probable cause to arrest has traditionally depended upon whether,

"the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

This test was interpreted in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) to mean that a prudent man would determine that he had "reasonably trustworthy information" if his informant was credible and his information reliable. In *Illinois v. Gates*, 462 U.S. 213 (1983) this Honorable Court rejected the rigid two-prong approach of *Aguilar* and *Spinelli* which required that both the "credibility" prong of the probable cause requirement and the "reliability" prong be fully satisfied, in favor of a more flexible approach to probable cause. Under the *Gates* approach, an assessment may be made of both the credibility of the informant and the reliability of the information together to determine whether upon "the totality of the circumstances," probable cause may be established. However, nowhere in the opinion of this Court in *Gates* is there the slightest suggestion that the standard of probable cause has been lowered. Yet, in the case at bar, the Seventh Circuit states unequivocally that *Gates* postulated, "a lower standard of probable cause." (App. 13).

Although *Gates* may have rejected the rigid two-prong approach of *Aguilar* and *Spinelli*, it did not obviate the need for independent investigation by the police and corroboration of an informant's tip. Quite the contrary, *Gates* is a classic example of the requirement of independent investigation and the need for corroboration of an informant's tip. It involved an unsigned letter to the police notifying them that Mr. and Mrs. Gates were involved in narcotics traffic. It described their modus operandi, includ-

ing flights to Florida, specific motels, and other details. In affirming the conviction in *Gates*, this Court noted that the police did not simply arrest on the basis of the informer's tip, but conducted a thorough and detailed investigation prior to arrest in an attempt to corroborate the information received from the informant. Certainly, the ruling of the Seventh Circuit at bar conflicts with the decisions of this Court in *Beck v. Ohio*, *supra*, and *Illinois v. Gates*, *supra*. It is in conflict with these decisions in that it rejects the necessity for independent investigation by the police of a supermarket guard's uncorroborated accusation prior to a warrantless arrest for a minor misdemeanor. It is also in conflict with these decisions when it holds that after *Gates* there is "a lower standard of probable cause." (App. 13). See also *Draper v. United States*, 358 U.S. 307 (1959) (where this Court found probable cause based upon the detailed and corroborated information of a credible informer who had provided the police with accurate information in the past).

D. The Seventh Circuit Decision Interpreting Illinois Law Is In Conflict With The Decisions Of The Illinois Supreme Court.

The Seventh Circuit, relying upon *dicta* from a 1974 Illinois appellate court case affirmed the grant of summary judgment in this case primarily on the following inaccurate proposition of law (App. 11-12):

"In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest. E.g., *People v. Foss*, 18 Ill.App.3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974)."

People v. Foss, does not appear in any volume of *Shepards* as cited authority for this proposition because this is neither the law of the State of Illinois nor the holding

of the case. For example, in *Dutton v. Roo-Mac, Inc.*, 100 Ill.App.3d 116, 426 N.E.2d 604 (1981), the court held that when an arresting officer relies solely on the information which a restaurant employee gave him in making the arrest, without conducting an independent investigation, this unlawful arrest will support a state action for false imprisonment.

In *People v. Foss, supra*, the only issue was whether or not a person has the right to resist an illegal arrest by police. The *Foss* opinion actually is authority for the proposition that "a police officer may not make an arrest unless he believes that probable cause exists, justifying the arrest." 309 N.E.2d at 678. *People v. Foss* is not authority for the proposition relied upon by the Seventh Circuit. (App. 11-12). In fact, *Foss* states the established rule in Illinois that allows a person arrested,

"... to inquire of the police as to the reason for the arrest; point out the officer's mistake; protest and argue; but no one is allowed to impede the police arrest by physical action."

18 Ill.App.3d 496, 497, 309 N.E.2d 677, 678.

The Illinois Supreme Court recently reaffirmed the long-standing rule that Illinois follows "the decisions of the United States Supreme Court on identical State and Federal constitutional problems," including the fourth amendment issue of warrantless arrests and the need for probable cause stating,

"The Code of Criminal Procedure of 1963 allows a warrantless arrest only when a peace officer 'has reasonable grounds to believe that the person is committing or has committed an offense.' (Ill. Rev. Stat. 1983, ch. 38, par. 107-2(1)(c)). As used in the statute, 'reasonable grounds' is considered to have the same substantive meaning as 'probable cause.' *People v.*

Wright, 56 Ill.2d 523, 528-29, 309 N.E.2d 537 (1974), quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).”

People v. Tisler, 103 Ill.2d 226, 469 N.E.2d 147, 153, 156 (1984). The substance of the information contained on the criminal complaint form did not contain sufficient facts to justify the warrantless arrest of petitioner. (See App. 29). The Illinois standard is detailed in *People v. Tisler*, *supra*, and explained in the opinion as follows:

“In reference to Federal and State warrant requirements, this court has explained that a detached judicial officer must resolve the question of whether probable cause exists to justify issuing a warrant. The decision is to be based on information contained in sworn statements or affidavits that are presented to the magistrate [citations]. Whether probable cause exists in a particular case turns on the ‘totality of the circumstances and the facts known to the officers and court when the warrant is applied for.’ ”

Tisler, 469 N.E.2d 147, 152. Inasmuch as the arresting officers admitted in their *answer* to petitioner’s amended complaint, and their *affidavits* as filed in the district court, that the arrest of petitioner was based solely on the Jewel store’s complaint form, it is obvious the information as contained in that document does not meet the state or federal standards for probable cause. (R. 43, para. 10, police *answer* to petitioner’s amended complaint) (R. 94-R, pp. 40-42, Cosgrove’s deposition) (R. 32, para. 9, police *affidavit*, “the arrests are made on the basis of the Complaints.”) (See App. 29, reproduced copy of the Jewel criminal complaint used in this case). The Illinois Supreme Court has made it clear that when a police officer acts as his own magistrate in effecting a warrantless arrest “the probable cause standard is at least as stringent as those that guide a magistrate in deciding whether or not to issue a warrant.” *Tisler*, *supra*, 469 N.E.2d 147, 153.

The Illinois Supreme Court approved the "totality-of-circumstances standard" mandated by this Honorable Court, ruling that "we adopt the *Gates* standard for resolving probable cause questions under the Illinois Constitution that involve an informant's tip." *Tisler*, 469 N.E.2d at 157. The Seventh Circuit erred in attributing to the State of Illinois the proposition that "In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest." (App. 11-12). The Seventh Circuit admitted that this Honorable Court "had not spoken on the question" and has improperly used the erroneous proposition as a rule of law in petitioner's case to justify probable cause to arrest. (App. 11-13).

II.

JEWEL'S ILLEGAL UTILIZATION OF THE CRIMINAL COMPLAINT AND THE CUSTOMARY PLAN OR AGREEMENT WITH THE POLICE MADE JEWEL A STATE ACTOR LIABLE UNDER SECTION 1983.

Any one of the following "special accommodations" would clearly indicate the joint participation between the police and the personnel of Jewel in *state action*. The cumulative effect of all of them is to establish without question the existence of a *customary plan or agreement* whereby Jewel exercised the prerogatives and power of the state.

A. Jewel's Illegal Utilization Of The Criminal Complaint And Its Filing The Fraudulent Document In The State Court Creates Section 1983 Liability.

The Seventh Circuit properly found that the respondents in this case violated state law because of the procedure which both Jewel and the police used in attesting to the signature in the affidavit portion of the complaint. (App. 2-3). However, the Seventh Circuit incorrectly concludes

this violation of state criminal law to be of no federal constitutional significance. (App. 3-4).

The Seventh Circuit has ignored the various Supreme and federal circuit court cases holding that the placing of signatures on local city and state forms, without the formality required by law, is in violation of the criminal and civil provisions of the federal civil rights act.

In *Carrasco v. Klein*, 381 F.Supp. 782 (E.D. N.Y. 1974), the defendants had violated Sec. 1983 by falsely claiming in a civil case that the affidavit, as filed, had in fact been sworn to before filing the document in the court system. The respondents in the case at bar are similarly liable for falsely stating that the criminal complaint was executed in conformity with the requirements of law. The respondents' motions for summary judgment should have been denied in the case at bar, as it was in *Carrasco*, 381 F.Supp. at 785. Accord *Delatte v. Genovese*, 273 F.Supp. 654 (E.D. La. 1967) (Sec. 1983 violation when public employee violates his duties under state statute and is the ultimate cause of plaintiff's commitment).

An example of private persons placing signatures on local government court forms, resulting in violations of the federal civil rights act, occurred in *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971). In *Wiseman*, the two criminally accused defendants merely placed their signatures on a form entitled *affidavit of service* and filed them in the civil clerk's office in New York City. These two persons were both convicted of violation of the criminal aspects of civil rights under 18 U.S.C. Sections 2 and 242, which carry essentially the same language of Sec. 1983. *Wiseman* illustrates that a falsely executed affidavit violates the "under color of" clause of Sec. 1983, mandating a finding of state action. 445 F.2d at 794.

In *Lugar v. Edmonson*, 457 U.S. 922 (1982), this Honorable court said that the defendants' utilization of State

court processes, through misuse by a private person, is subject to constitutional restraints and may properly be addressed in a Sec. 1983 action. 73 L.Ed.2d at 498. *Lugar* teaches that to act “under color” of law does not require that Jewel, in the case at bar, be an officer of the State.

B. Evidence Of A Customary Plan To Have Police Arrest Anyone Jewel Wanted Arrested.

The Seventh Circuit correctly stated the applicable law creating state action, “if the police promise to arrest anyone the shopkeeper designates, then the shopkeeper is exercising the state’s function and is treated as if he were the state.” (App. 5). The verified record in this case is replete with admissions from both the police and the Jewel respondents that the police would arrest anyone the Jewel wanted arrested. (R. 94-R, pp. 13-21, 46) (R. 32, para. 9-11, affidavit of Officer Cosgrove) (R. 94-V, pp. 39-43) (R. 43, para. 10, police answer to petitioner’s amended complaint). For example, this is illustrated in the record as follows (R. 94-R, pp. 20-21):

Q. (Plaintiff’s Counsel): Now, with respect to the complaint that would have already been filled out, what would have been the normal course of business that you would have followed? You are at the Jewel, the Jewel person is in the security room and the security guard is there, you got the complaint filled out. In your experience, what would have happened next?

A. Can you repeat that, please?

Q. Sure. (Question read back as requested)

A. Well, if the Jewel wanted the individual arrested, we would arrest him.

Q. They would be arrested; right?

A. Sure.

Q. What would happen then?

A. We would take them to the station and process them.

The Seventh Circuit properly states that a private party comes within Sec. 1983 only when "he is a willful participant in joint action with the State or its agents. . . ." (App. 5). The Seventh Circuit correctly states that shopkeepers are engaged in state action when they strike a deal with the police under which the police simply carry out the shopkeepers' directions. If the police promise to arrest anyone the shopkeeper designates, then the shopkeeper is exercising the state's function and is treated as if he were the state. (App. 5).

The Seventh Circuit said that this principle is the basis for the finding of state action in various cases including *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977); *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975); *Moore v. Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985), and many other cases. (App. 5).

The Seventh Circuit incorrectly states that every witness in deposition stated that there was no agreement, and the police exercised independent judgment. (App. 7). The Seventh Circuit is also incorrect in stating that each witness "denied that there was any arrangement, plan or scheme under which the police would arrest anyone Jewel wanted arrested." (App. 6). Contrary to the Seventh Circuit's assertions, the record in this case shows that petitioner did in fact present evidence, through the deposition testimony of the respondents themselves, that the police had arrested anyone Vaughn and other Jewel security agents designated for arrest in the past. (R. 94-V, pp. 42-43) (R. 94-R, Officer Cosgrove Deposition, pp. 18, 20-21, 46).

Further, the Seventh Circuit incorrectly characterizes the police arrest process at the Jewel by stating, "If the guard thought the evidence strong, then the police had to decide what to do." (App. 7). This is contrary to the

record in this case. The deposition testimony of Jewel and the police shows that whenever Jewel's guard wanted a person arrested, the 18th District police would arrest. (R. 94-V, pp. 42-43) (R. 94-R, pp. 20-21) (R. 32, para. 9).

The totality of the evidence, in the record of the instant case, demonstrates the essentials of the basic plan, with the keynote expressed by Officer Cosgrove in deposition: "Well, if the Jewel wanted the individual [detained] arrested, we would arrest him." (R. 94-R, pp. 18, 20-21, 46).

C. Jewel Used The Threat Of Arrest As A "Bargaining Chip" To Have Petitioner Accede To Their Demands.

Instead of investigating the dispute between the Jewel security guard and the petitioner, the police testified that they assisted Jewel in using the threat of arrest to coerce the petitioner to accede to the security guard's demands that the petitioner pay for the merchandise in dispute. This is shown in the verified record:

Q. (Stamos, Petitioner's Counsel): . . . What happened next on that scene?

A. (Officer Cosgrove): Well, we inquired to what they wanted done here, how they wanted us to handle the situation.

Q. That's Jewel?

A. Right.

Q. And what did they tell you?

A. They said they wanted Mr. Gramenos to pay for the articles. He said he wasn't going to pay for anything. They said, well, we want him arrested.

Q. So, in your presence, it's your recollection that Gramenos was asked to pay for the articles as a matter of resolving the dispute?

A. Right.

(R. 94-R, pp. 40-41).

Officer Cosgrove's own testimony conclusively shows that the police relied upon the Jewel security guard to tell them what to do. *Id.* at 18. The police followed a policy that allowed Jewel's security guards to substitute their judgment for that of the police. Such cooperative activity between the police and Jewel is sufficient to make Jewel a party acting under color of state law. *E.g., Lusby v. T.G.&Y. Stores, supra; Classon v. Shopko Stores, Inc.,* 435 F.Supp. 1186 (E.D. Wis. 1977); *Duriso v. K-Mart, supra; El Fundi v. Deroche, Manager Target Store,* 625 F.2d 195, 196 (1980); *Moore v. Marketplace Restaurant, Inc., supra.*

Officer Cosgrove testified to a different procedure he would follow in non-merchant cases. (R. 94-R, pp. 13-21). He deposed that in misdemeanor cases, other than merchant cases, whenever any person was accused of a crime, which was not witnessed by the police, Cosgrove would conduct an independent investigation. The process that he would follow in non-merchant cases would include talking to the accused and conducting an interview to determine the accused's version of the incident. (R. 94-R, pp. 13-21). This is essentially the investigative technique mandated by the Seventh Circuit in minor misdemeanor cases. *See Moore v. Marketplace Restaurant, supra.* It was not done in the case at bar.

Unlike the investigative techniques, as outlined above, Officer Cosgrove testified that in Jewel shoplifting allegations, "When the police are called in, arrests are made on the basis of the Complaints." (R. 32, para. 9, *affidavit* of Officer Cosgrove, April 1981). In this case, it is evident that the police substituted the judgment of a private corporation for their own official state authority.

Since the police did not independently investigate the Jewel security guard's allegations of a misdemeanor of-

fense, as a matter of police and Jewel standard operating procedure, this left Jewel with the authority to bring its own criminal charges. Thus, Jewel exercised a State inquisitorial right. This same activity was held violative of Sec. 1983 in *Lusby v. T.G.&Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *vacated in part* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986), and the store was held to be acting under color of state law. 749 F.2d at 1433.

CONCLUSION

In conclusion, there are few more horrifying experiences than that of being suddenly snatched from a peaceful and orderly existence and placed in the helpless position of having one's liberty restrained, under the accusation of a crime. Society's pervasive and strong interest in preventing and redressing attacks upon reputation is noted in *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). For the various reasons presented herein, this petition for certiorari should be granted.

Respectfully submitted,

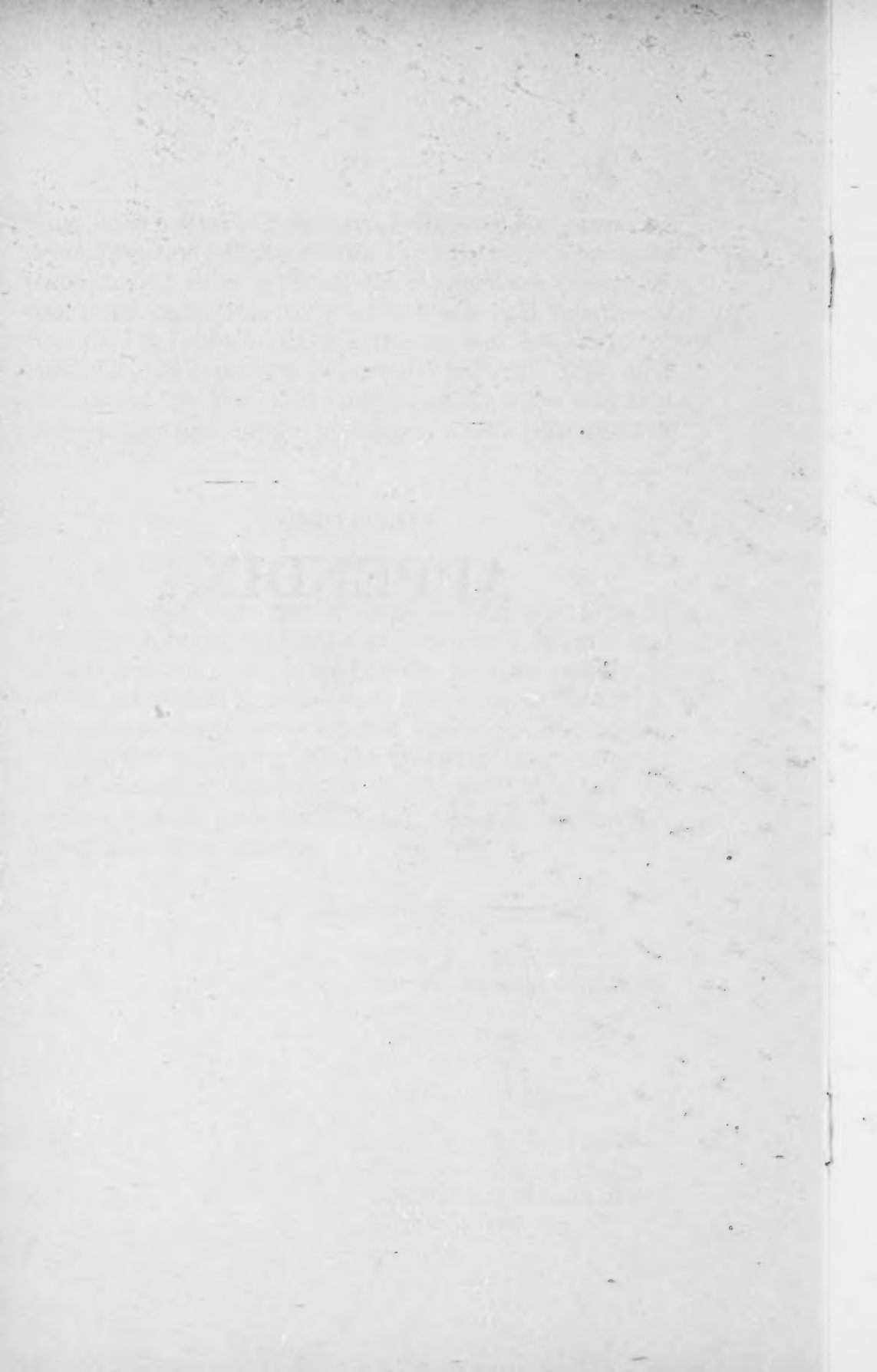
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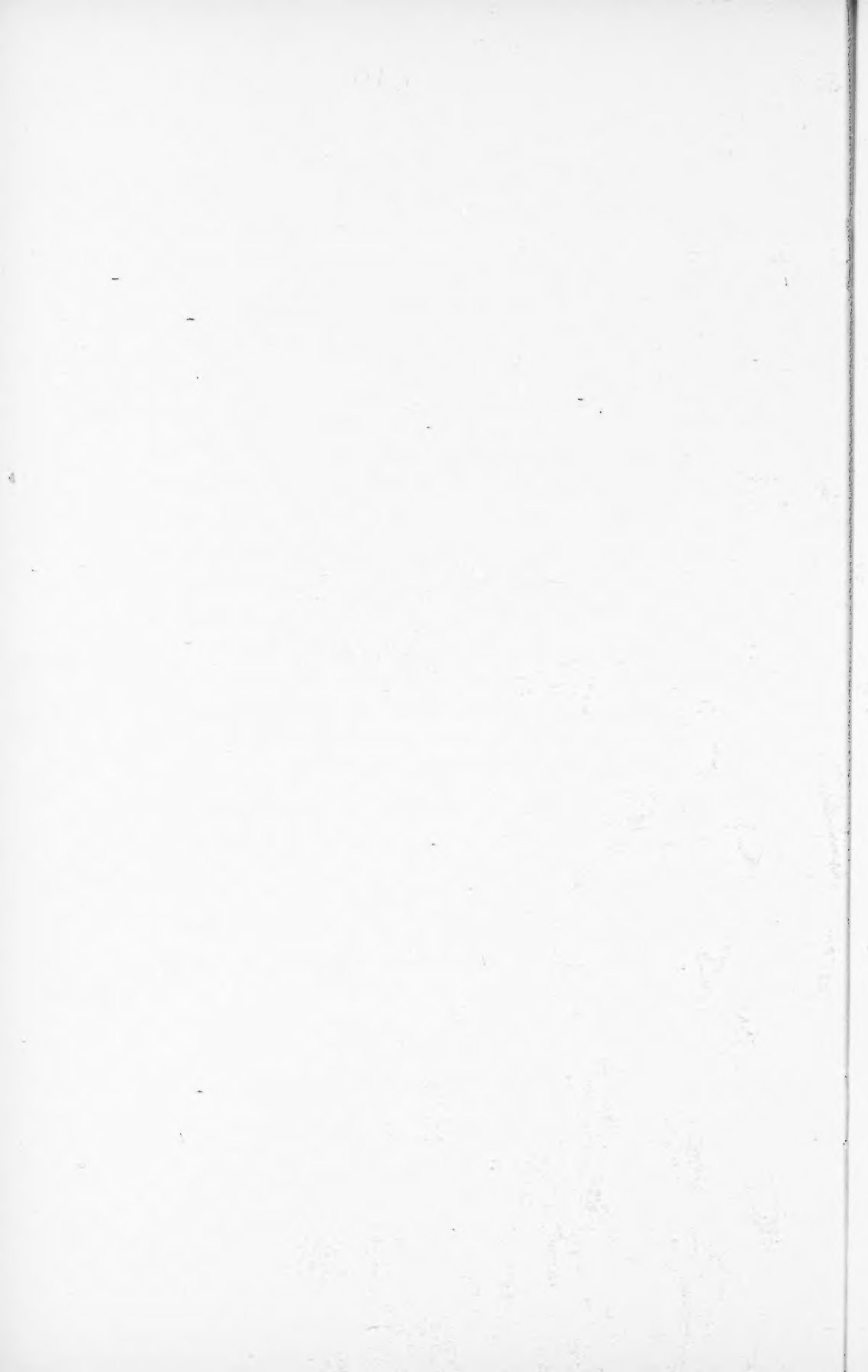
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APPENDIX



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App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2767

JAMES N. GRAMENOS,

Plaintiff-Appellant,

v.

JEWEL COMPANIES, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 C 709—John A. Nordberg, Judge.

ARGUED MAY 14, 1986—DECIDED JULY 25, 1986

Before POSNER and EASTERBROOK, *Circuit Judges*, and
CAMPBELL, *Senior District Judge*.*

EASTERBROOK, *Circuit Judge*. Johnny Vaughn, a security guard at a Jewel supermarket, stopped James Gramenos, a customer, at 11:30 p.m. as he was leaving the store. Gramenos remonstrated with Vaughn and then ran through the store. Vaughn caught him and held him in an office until Joseph Schmit and Frank Cosgrove, officers of the Chicago police, arrived. Vaughn accused Gramenos of

* Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

shoplifting, displaying a jar of baby food, a box of gelatin, and two tubes of toothpaste, which Vaughn said he had seen Gramenos put in his pocket while shopping and then scatter during his dash through the aisles. Gramenos denied stealing the items, stating that he first had taken Vaughn for an assailant and then, on learning that Vaughn was a guard, had gone in search of the store's manager to complain about Vaughn's behavior. Vaughn signed a complaint. The police arrested Gramenos, who protested: "You can't do this. I want to talk to witnesses and get my side of the story. I am a lawyer. I am a public defender." (One patron in the store recalls that Gramenos kept saying: "You can't arrest me, I'm a lawyer.") The police let him go at 4:15 a.m. after he posted a \$100 bond.

Gramenos was prosecuted and acquitted. Vaughn was the only witness for the state, and at the end of Vaughn's testimony the judge stated: "I think on all things I think there is a misunderstanding. I have a doubt. Finding of not guilty." Gramenos then turned the tables, filing this suit under 42 U.S.C. §1983 against the supermarket, Vaughn, the two arresting officers, and Sgt. Frank Heatley, the desk officer at the police station at which Gramenos was held. After discovery had been completed, the defendants moved for summary judgment. A magistrate recommended that the district judge grant the motion; the judge did so, adopting the magistrate's short opinion.

I

Illinois law requires that a criminal complaint be sworn. Ill. Rev. Stat. 38 §111-3(b). Vaughn's complaint was not properly sworn. Vaughn signed the complaint, but not in the presence of the attesting officer, Sgt. Heatley. Gramenos believes that on this account Vaughn and the police must pay him damages. We will assume that the procedure of attesting the signature out of the presence of the witness violates state law. It does not matter. In a suit under §1983 the plaintiff must show a violation of the Constitution or laws of the United States, not just

a violation of state law. The two are not the same. E.g., *Carson v. Block*, 790 F.2d 562, 565 (7th Cir. 1986) (collecting cases); *McKinney v. George*, 726 F.2d 1183, 1188-89 (7th Cir. 1984) (holding that a warrantless arrest on probable cause does not violate the fourth amendment even if state law required the police to have prior authorization). No principle of federal law makes a properly attested complaint necessary to an arrest or a criminal prosecution. Police often arrest suspects on the basis of oral reports from witnesses, and the state may prosecute against the wishes of all witnesses.

Gramenos states that: "The failure to file a valid complaint, in of [sic] itself, establishes a violation of §1983 [sic]. *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977); *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975)." Neither case says anything like this. The complaint in *Smith* was irregular, but the violation of the Constitution was that the police arrested a suspect without either a valid complaint (the witness signed a blank piece of paper) or any knowledge of the facts. As the court put it, the police "depended on the conclusory assessment of the store officers. These store managers, in turn, did not have probable cause for believing that McClure was a shoplifter and that Smith was an accomplice." 519 F.2d at 94. In *Duriso* the complaint was *properly* signed, and it was this complaint that furnished the basis for concluding that the complaining witness knowingly made a false charge under color of state law. 559 F.2d at 1277-78. In both *Smith* and *Duriso* the constitutional problem was the lack of probable cause to make an arrest. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1349 (7th Cir. 1985), on which Gramenos relies for assistance on every other issue in the case, states: "this court once again notes that an alleged violation of a state statute does not give rise to a corresponding §1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution." Gramenos does not even try to explain how his position can be reconciled with *Moore*.

App. 4

Gramenos insists, however, that the Supreme Court has held that violations of state law also violate the Constitution. The brief cites *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and *Davis v. Scherer*, 468 U.S. 183 (1984). The question in *Harlow* was one of immunity, and the Court said that officials are immune from liability in damages for the violation "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. A rule that a clear violation of statute will remove an immunity—because the statute gives notice of the conduct required, so that the defendant cannot say that the norm took him by surprise—is a far cry from saying that the violation of a statute is itself a violation of the Constitution. *Davis* then holds that violations of statutes generally do *not* dissipate immunity, stating: "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." 468 U.S. at 194. A footnote continues: "Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon." 468 U.S. at 194 n.12. The statute involved in this case is not a statute of the United States, the violation of which would be actionable under §1983.

II

Gramenos accuses Jewel, Vaughn, and the police of conspiring to deprive him of his constitutional rights. There are two problems. One, which applies to all defendants, is that the claim assumes a deprivation of rights—an arrest that is unreasonable within the meaning of the fourth amendment, now applicable to the states through the fourteenth. If the arrest was constitutionally unreasonable, then the police are liable under §1983 without regard to the "conspiracy", and if not, not. We defer to Part IV the discussion whether the arrest was supported by probable cause. The other problem, which applies to Jewel and

Vaughn, is that the Constitution applies only to governmental actors. Gramenos does not contend that one who accuses someone else of a crime is exercising the powers of the state. A private party comes within §1983 only when "he is a willful participant in joint action with the State or its agents. . . . Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the [state]." *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). Although private parties call on the aid of state law "without the grounds to do so", when the private decision may "in no way be attributed to a state rule or a state decision" (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940 (1982)), the private parties are not state actors. There must be a conspiracy, an agreement on a joint course of action in which the private party and the state have a common goal. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

Adickes, the last in a line of cases in which restaurateurs and others used the trespass or vagrancy laws to enforce racial segregation long after it became clear that the state may not discriminate on account of race, has become the basis for a rule that shopkeepers are engaged in "state action" when they strike a deal with the police under which the police simply carry out the shopkeepers' directions. If the police promise to arrest anyone the shopkeeper designates, then the shopkeeper is exercising the state's function and is treated as if he were the state. This approach is the basis for the finding of state action in *Duriso* and *Smith* and, among many other cases, *Moore v. Marketplace Restaurant*, 754 F.2d at 1352-53; *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *vacated in part*, 106 S. Ct. 40 (1985); and *Davis v. Carson Pirie Scott & Co.*, 530 F. Supp. 799 (N.D. Ill. 1982). But if the shopkeeper is operating independently, his conduct is judged under the state tort law (false arrest, malicious prosecution, slander, and the like) rather than the fourth amendment. Cf. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149

(1978). The parties agree on these principles but disagree about their application to this case.

Gramenos took the deposition of every significant actor in the case. Each denied that there was any arrangement, plan, or scheme under which the police would arrest anyone Jewel wanted arrested. Gramenos did not present any evidence to pierce these denials—such as evidence that the police have arrested everyone Jewel wanted arrested in the past. The police stated that they had not arrested anyone at Vaughn's request before, so it is not possible to conclude that Vaughn had struck his own bargain with them. A party may not cry "conspiracy" and throw himself on the jury's mercy. Even if the jury should disbelieve all the denials, this would leave Gramenos with no evidence. There must be a genuine dispute about a material fact. *Anderson v. Liberty Lobby, Inc.*, 54 L.W. 4755, 4758-60 (U.S. June 25, 1986). A jury in this case could come out only one way.

There are three bits of evidence on which Gramenos seizes. First, Jewel kept printed complaint forms in its stores. Its employees filled these out when they caught shoplifters. Second, the "Chief of Loss Prevention" of Jewel stated that Jewel left its guards with full discretion to decide when to let a suspect go and when to "lock him up." Third, officer Cosgrove stated that "if the Jewel wanted the individual arrested, we would arrest him." The supermarket's use of preprinted forms does not show that the police and Jewel entered into a plan of any kind. The store keeps the forms for its own convenience. Shoplifting is common; it makes sense for a store to have a stock of forms whether or not the store has an agreement with the police. The two statements, read in context, do not show that Jewel and the police had a standing arrangement; the chief of loss prevention, like officer Cosgrove and everyone else, denied it. The point of each statement was that the guard in the store had discretion to decide whether to let the suspect go or press charges. If the guard thought the evidence weak, neither Jewel's management nor the police would question a decision to

drop things then and there. If the guard thought the evidence strong, then the police had to decide what to do. A party cannot resist summary judgment by pointing to snippets of depositions when the point of *every* witness's statement was that there was no agreement, and the police exercised independent judgment. They may have exercised poor judgment (a subject to which we return), but they exercised judgment. Plausible inferences must be resolved in favor of the party opposing summary judgment, but the inferences Gramenos presses on us are not plausible. A verdict by the jury for Gramenos would have to be set aside. The evidence of conspiracy here is weaker than the evidence in *Moore*, 754 F.2d at 1352-53, a case in which the defendants received summary judgment.

III

The police held Gramenos between 11:55 p.m., when they left the store, and 4:15 a.m., when they allowed him to post \$100 and go. They did not take him before a magistrate. He seeks compensation for what he says is excessive detention. The magistrate did not discuss this claim, and the police respond to it only by pointing out that they need to do a lot of things after an arrest—take fingerprints and mug shots, check for outstanding warrants, fill out countless forms. One difficulty is that none of the evidence in this case quantifies the amount of time it would take reasonably diligent officers to complete these tasks. Another is that there is some evidence that the police held Gramenos out of spite—or perhaps to impose the real punishment for shoplifting, see Malcolm M. Feeley, *The Process is the Punishment* (1979)—rather than out of a need to complete essential tasks. When Gramenos arrived at the stationhouse he asked to be released on bond. He states that officer Schmit replied: "Counsel, we are going to keep you here for four hours."

"[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention

to take the administrative steps incident to arrest." *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975). When the "administrative steps" have been completed, the police must take the suspect before a magistrate to establish probable cause, or they must let him go. The Court has never said how long the "brief period" may be. The American Law Institute thinks that two hours are enough. *Model Code of Pre-Arrest Procedure* §130.2(1) (1975). We held in *Moore*, 754 F.2d at 1350-52, that four hours requires explanation. This case is in essentially the same posture as *Moore*: an unexplained four hours of detention in the dead of night. It must be remanded for further proceedings.

It is premature to say how long is too long under the fourth amendment. On remand the police should explain what must be done after an arrest for shoplifting and why reasonably diligent officers need more than four hours to do it. The court also should determine whether four hours is an acceptable period for a non-violent misdemeanor. If the police choose to perform time-consuming tasks after an arrest, perhaps they must do so on their own time rather than the suspect's, issuing a citation rather than keeping the suspect locked up in the interim.

IV

Whether summary judgment is proper on the question whether the police were entitled to arrest Gramenos is the most difficult issue in the case. When Schmit and Cosgrove arrived at the store, Vaughn told them that he had seen Gramenos put items in his pocket, pass through the checkout line (paying for other items), and try to leave the store. Vaughn intercepted Gramenos on his way out, and, according to Vaughn, Gramenos then took off through the aisles, emptying his pockets. Vaughn displayed the items to the officers, saying that he and a stockboy had collected them. Gramenos conceded touring the aisles at a good clip (he says it was a fast walk) but denied removing things from his pockets or having anything that

needed to be removed. Gramenos states that at this point the police took him into custody, believing Vaughn's story over his. This is not probable cause, Gramenos asserts, because the police bypassed an opportunity to interview the stockboy and shoppers to determine who was telling the truth.

In depositions the police stated that they had interviewed the stockboy and two customers, who corroborated Vaughn's tale. Two shoppers also gave depositions, each stating that he had talked with the police and had seen Gramenos do suspicious things. The magistrate stated that "it is uncontradicted that the officers did independently interview and investigate the facts" and concluded, on this ground, that they had probable cause. This is not correct; Gramenos contradicts the officers' claim that they interviewed other witnesses. Although Gramenos was under restraint and therefore could not observe everything the police did, he offered some reasons that might lead a jury to conclude that the other shoppers had mistaken his arrest for that of some other person. The arrest report the officers filled out at the time does not mention witnesses other than Vaughn. Affidavits filed by the officers also state that the arrest was made on Vaughn's complaint and omit mention of other witnesses. And each of the two shoppers' descriptions of the arrest differs from what Gramenos and Vaughn agree occurred. One shopper, for example, said that he saw a white security guard escort Gramenos to an office and remove merchandise from his pocket; later the police took Gramenos away on a paddy wagon. Vaughn is black; no one else thinks that Gramenos had merchandise in his pocket when he reached the office; the merchandise this shopper recalls is not the kind Gramenos is accused of stealing; and the police left in a cruiser, not a paddy wagon. The second shopper stated that at the time she saw Gramenos in the Jewel store she was pregnant with her first child; the date on which she gave birth precludes her pregnancy at the time Gramenos was arrested. Now a jury might believe that this shopper was mistaken about her pregnancy rather

than her observation of the incident, as a jury might believe that the first shopper saw the incident but had trouble remembering the details. Eyewitness descriptions are notoriously full of inaccuracies. Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, 3 *Crime and Justice: An Annual Review of Research* 105 (1981). These are not the sort of issues that may be resolved on summary judgment, however.

We therefore take only the facts on which there is no genuine dispute. Vaughn, a store guard, told the police that he saw Gramenos put items in his pocket and try to leave the store with them, and that Gramenos ran wildly through the aisles scattering food after being confronted. Vaughn filled out a criminal complaint and signed it in the presence of the two officers. Gramenos denied everything (except walking quickly through the aisles). The police interviewed no one else and took Gramenos away. Did they have probable cause?

Two of our recent cases hold that the existence of probable cause is a question for the jury in a damages suit "if there is room for a difference of opinion." *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc); *Moore*, 754 F.2d at 1344-47. Probable cause can be a matter of degree, varying with both the need for prompt action and the quality of the information at hand. *Illinois v. Gates*, 462 U.S. 213, 235, 238-39 (1983); *Llaguno*, 763 F.2d 1564-66. There are many formulae for "probable cause" or "reasonable suspicion" but all speak of the exercise of judgment, of decisions "turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. This certainly sounds like the territory of the jury, leaving that body to determine probable cause and calling on the officer to pay damages unless he makes out a defense of immunity, perhaps under the rubric "probable cause to believe there was probable cause." See *Malley v. Briggs*, 106 S. Ct. 1092, 1098 (1986).

Yet we hesitate to conclude that 195 years after the fourth amendment was added to the Constitution there

must be a jury trial every time the police arrest a person accused by a store guard who says he saw the person shoplifting, a trial in which the jury will decide whether the police used the right investigative techniques. Each jury will have its own view of appropriate investigation, and the burden of trials will be a substantial tax on police for the privilege of doing their already difficult jobs. *Llaguno* and *Moore* were unusual cases, and they do not establish that every acquitted defendant is entitled to a trial on whether he should have been arrested. See *Williams v. Kobel, supra*. Both *Llaguno* and *Moore* involved warrantless entries into dwellings looking for suspects. The search in *Moore* was late at night, and the police lacked good information that a crime had been committed. There had been a dispute about the size of a bill in a restaurant, and whether this was a theft of service or a contract dispute was hard to tell. A jury might conclude that a nighttime arrest for an incident that may not have been a crime was unreasonable—and “reasonableness” is the central command of the fourth amendment. More generally, *Llaguno* and *Moore* merge the concepts of probable cause and reasonableness. This is sometimes inevitable, given the flexible quality of probable cause (which is less than a rule of more-likely-than-not, but how much less depends on the circumstances). See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 236-41, 243-56 (1984). The question is not always open-ended, however, and it may be possible to have an understandable definition of probable cause even though “reasonableness” remains as a separate issue. We think a separation is useful here, when the question concerns the sufficiency of the evidence to make an arrest in a public place. See *United States v. Watson*, 423 U.S. 411 (1976).

Vaughn was an eyewitness. The facts he related to the police (if he told the truth) establish a crime. Vaughn said that Gramenos had passed the checkout counter and was about to leave the store. Gramenos’s identity was not in dispute. In Illinois the report of an eyewitness to a crime

is sufficient to authorize an arrest. E.g., *People v. Foss*, 18 Ill. App. 3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974). The Supreme Court has not spoken on the question, but the formulae for probable cause, such as "a probability or substantial chance of criminal activity, not an actual showing of such activity", *Gates*, 462 U.S. at 244 n.13, quoted in *New York v. P.J. Video, Inc.*, 106 S. Ct. 1610, 1616 (1986), or "facts and circumstances known to the officer [that] warrant a prudent man in believing that an offense has been committed", *Henry v. United States*, 361 U.S. 98, 102 (1959), do not suggest that an officer risks his career and his fortune by believing an apparently sober eyewitness to a crime. A "prudent" officer may balk if the person claiming to be an eyewitness strolls into the police station and describes a crime from long ago, or if the person leveling the accusation is babbling or inconsistent. When an officer has "received his information from some person—normally the putative victim or an eye witness—who it seems reasonable to believe is telling the truth", *Daniels v. United States*, 393 F.2d 359, 361 (D.C. Cir. 1968), he has probable cause. Probable cause does not depend on the witness turning out to have been right; it's what the police know, not whether they know the truth, that matters. For example, *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984), held that a witness's complaint established probable cause as a matter of law, making a trial unnecessary. As the Eighth Circuit remarked in finding probable cause despite an officer's failure to conduct an investigation (even to look at the bill said to be counterfeit): "There is no constitutional or statutory requirement that before an arrest can be made the police must conduct a trial." *Morrison v. United States*, 491 F.2d 344, 346 (8th Cir. 1974). "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). See also 1 Wayne R. LaFave, *Search and Seizure* §3.2 (1978).

Police have reasonable grounds to believe a guard at a supermarket. We need not say that police always are entitled to act on the complaint of an eyewitness; a guard is not just any eyewitness. The chance that the complainant is pursuing a grudge, a risk in believing an unknown witness, is small in an institutional setting. The guard who pursues a private agenda may be fired and disgraced; there are automatic penalties that the police are entitled to consider. Cf. *Model Code of Pre-Arrest Procedure* at 297-303. The store will insist that guards err on the side of caution. It does not want to embarrass and anger an honest customer—not only because this is bad for business but also because a false charge of crime may lead to costly tort litigation under state law. Jewel Companies is not judgment-proof; its self-interest protects shoppers from unsubstantiated charges, and the police are entitled to consider this, too. The question is whether they have reasonable grounds on which to act, not whether it was reasonable to conduct a further investigation. Cf. *United States v. Edwards*, 415 U.S. 800, 807 (1974).

Some parallel rules suggest that one reliable eyewitness is enough. Even before *Gates*, a single tipster could supply probable cause to issue a search or arrest warrant, if the police had reason to think that the informant had first-hand knowledge and was reliable. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); both overruled (in favor of a lower standard of probable cause) by *Gates*. The opinions in *Aguilar* and *Spinelli* take it as a point of departure that the report of one identified, reliable eyewitness creates probable cause. The Court has never suggested that the police, with such information in hand, must conduct a further investigation or put contradictory evidence into the affidavit. Cf. *Franks v. Delaware*, 438 U.S. 154 (1978), holding that if an affidavit is sufficient on its face the defendant may not try to undercut the finding of probable cause by introducing other facts that the police left out, indeed that he may not even controvert the facts in the affidavit, unless he first shows that the author of the affidavit knew them

to be untrue and that without these facts the affidavit would not establish probable cause.

Just as a single eyewitness's statement—without further investigation or a narration of contrary evidence—can support a warrant, so a single eyewitness's statement can support an indictment and a conviction. If the state had chosen to indict Gramenos, it could have done so on the basis of Vaughn's testimony without offering Gramenos any opportunity to rebut the testimony and without telling the grand jury anything more. And if the judge at trial had chosen to believe Vaughn over Gramenos, that would have been sufficient to support a conviction "beyond a reasonable doubt." It would be passing strange if the evidence sufficient to establish guilt at trial were not enough to make an arrest. The trial gives extra safeguards, such as the right to cross-examine Vaughn and present evidence in reply, that enable the trier of fact to assess Vaughn's story more fully than the officers did on the scene, but the stakes at trial are also greater. The stakes in an arrest, in addition to the sheer embarrassment of it all, are whether the police may hold the suspect for the "brief period" (*Gerstein*, 420 U.S. at 114) necessary to handle housekeeping and get the suspect before a magistrate, and the level of inquiry is correspondingly lower. Cf. *United States v. Sharpe*, 105 S. Ct. 1568 (1985) (a detention of 20 minutes, perhaps more, may be justified on suspicion falling short of probable cause).

The police may discover, to their dismay, that when they do not conduct an investigation they cannot get a conviction. The uncorroborated testimony of Vaughn did not carry the day at trial. If the two shoppers and the stockboy had testified, things might have come out differently. But the fourth amendment does not define as probable cause whatever good police practice requires, or whatever proves necessary to prevail at trial. A rule under which a single eyewitness's report can be probable cause does not induce the police to make careless arrests; their own concern for their reputations as producers of good cases will lead them to do more as a rule—as the officers say they did more in this case.

One more consideration supports the conclusion that the report of an eyewitness who has good reasons to tell the truth furnishes probable cause: that "probable cause" is not always sufficient to make an arrest. "Probable cause" appears in the fourth amendment only as a requirement for a warrant. The general rule, in the first clause of the amendment, is that "[t]he right of the people, to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated". Probable cause, a soundly-based belief that the suspect may have committed a crime, is only one component of the "reasonableness" of arresting and detaining a person. When the arrest for a felony occurs in a public place in the daytime, probable cause is the only question. *United States v. Watson*, *supra*; see also *United States v. Santana*, 427 U.S. 38 (1976). Even then the police may hold the suspect only for a "brief period" (*Gerstein*, 420 U.S. at 114) pending presentation of the case to a judicial officer. When the arrest requires the use of deadly force, probable cause is not sufficient. *Tennessee v. Garner*, 105 S. Ct. 1694 (1985). When the arrest takes place in a home, the police officer's assessment of probable cause ordinarily is not sufficient; the officer must get a warrant unless the circumstances are exigent. *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980). When the arrest (or any other seizure) takes place in a private place at night, the police ordinarily must meet an elevated standard (be "positive") and perhaps establish a special need for haste or stealth. Fed. R. Crim. P. 41(c)(1); *Gooding v. United States*, 416 U.S. 430, 455-58 (1974); *Jones v. United States*, 357 U.S. 493, 498 (1958).

The common law contains one more limit, a constraint of special pertinence here: an officer may make a custodial arrest for a misdemeanor only if the crime was committed in his presence. See Wayne R. LaFare, *Arrest: The Decision to Take a Suspect into Custody* 17-30 (1965), for a description of the common law and its limits. The rule reflects a widely-held belief that misdemeanors should be prosecuted by citation unless the officer has seen the crime committed, which greatly reduces the chance of

mistaken arrest. Those stopped for misdemeanors such as traffic offenses usually are cited and released on the spot after posting bond. Most reports of misdemeanors will not produce a sentence of custody (as opposed to a fine or probation), so a custodial arrest itself becomes a substantial part of the penalty. The Supreme Court has bypassed opportunities to decide whether the common law rule is part of the fourth amendment, see *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). In deciding other questions under the fourth amendment, however, the Court has found the historical practice a useful guide. E.g., *Edwards*, 415 U.S. at 804 n.6; *Watson*, 423 U.S. at 418-22; *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977). Searches must be "reasonable", but "reasonable" may be a term of legal art defined by history and not an invitation to modern invention; when the term has a developed meaning, it controls the course of decision.

Illinois is among the states that have altered the common law rule. It allows a full custodial arrest for any crime on probable cause. Ill. Rev. Stat. ch. 38 §107-2(c). See also *Model Code of Pre-Arrest Procedure* 692-95 (collecting statutes in other jurisdictions). The A.L.I. recommends a statute allowing a custodial arrest for a misdemeanor if the officer has reasonable cause to believe that the suspect will not appear in response to a summons or will injure himself or others. *Model Code* §120.1(1)(b) and commentary at 289-90. Given the statute in Illinois, and the principles of official immunity in *Pier-son v. Ray*, *supra*, and their enlargement in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the officers' decision to arrest Gramenos cannot be the basis for an award of damages, if there was probable cause. Cf. *Michigan v. DeFilippo*, 443 U.S. 31 (1979). We are not authorized to decide in this case whether the statute abrogating the common law rule—without putting equivalent guarantees of reasonable conduct in its place—comports with the fourth amendment. But this discussion is not a detour. It is important to understand that "probable cause" is not always the same thing as "reasonable" conduct by

the police, and that one reason why it is appropriate to treat the statement of an apparently reputable eyewitness as probable cause is that other rules potentially affect the propriety of making an arrest on this information.

Gramenos does not challenge the "reasonableness" of his arrest if there is probable cause, and he does not seek relief against the operation of the Illinois statute authorizing misdemeanor arrests on probable cause. It is not appropriate to read every element of constitutional "reasonableness" back into the term "probable cause". These terms serve distinct functions, which are lost by a homogenization of the legal vocabulary. We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices. There is a gap, often a wide one, between the wise and the compulsory. To collapse those two concepts is to put the judicial branch in general superintendence of the daily operation of government, which neither the fourth amendment nor any other part of the Constitution contemplates.

The judgment is affirmed, except that the portion granting summary judgment on the claim of excessive detention is vacated, and the case is remanded for further proceedings consistent with Part III of this opinion. Jewel and Vaughn shall recover their costs. Gramenos and the police officers shall bear their own costs.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

App. 18

JUDGMENT — ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 25, 1986.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

JAMES N. GRAMENOS, *Plaintiff-Appellant,*
No. 85-2767 vs.
JEWEL TEA Co., et al., *Defendants-Appellees.*

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 C 709—John A. Nordberg, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is AFFIRMED, except that the portion granting summary judgment on the claim of excessive detention is VACATED, and the case is REMANDED for further proceedings consistent with Part III of the opinion. Jewel and Vaughn shall recover their costs. Gramenos and the police officers shall bear their own costs.

* The Honorable William J. Campbell, of the Northern District of Illinois, sitting by designation.

App. 19

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 29, 1986.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 85-2767

JAMES N. GRAMENOS,

Plaintiff-Appellant,

v.

JEWEL COMPANIES, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 C 709—John A. Nordberg, Judge.

ORDER

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on August 8, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

* Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

App. 20

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

September 11, 1985

Judge Nordberg

No. 81 C 709

Gramenos -v- Jewel Tea Co., et al.

* * * * *

DOCKET ENTRY: Having reviewed the pleadings and
briefs of the parties and the Report & Recommendation
of the Magistrate dated June 25, 1985, the court adopts
the Report and Recommendation of the Magistrate and
hereby grants defendants' motion for summary judgment.

* * * * *

App. 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES N. GRAMENOS,

Plaintiff,

No. 81 C 709

v.

JEWEL TEA Co., et al.,

Defendants.

TO: HONORABLE JOHN A. NORDBERG, JUDGE
UNITED STATES DISTRICT COURT

HONORABLE SIR:

REPORT AND RECOMMENDATION
of Magistrate James T. Balog

Before the court are the separate motions of the Defendants for summary judgment and motions to strike the Plaintiff's Exhibits in his Reply Memorandum in Opposition to Summary Judgment.

The facts of this case arise out of the arrest of the Plaintiff, James N. Gramenos ("Gramenos") for attempted retail theft. On February 12, 1980, the Plaintiff was shopping in a store owned by the Defendant Jewel Tea Co. ("Jewel"), located at 1210 North Clark Street in Chicago. At approximately 11:30 p.m., the Defendant Johnny Vaughn ("Vaughn"), a security officer for Jewel, stated that he observed the Plaintiff place merchandise in his coat pocket. (Defendant's Reply Memorandum in Support of Summary

Judgment, Ex. 1 at 6).¹ Vaughn stated that he observed the Plaintiff pay for other merchandise at the check-out counter, but that he had not paid for the items Vaughn saw him put and keep in his coat pocket. After the Plaintiff had passed the last point where he could have paid for the merchandise, Vaughn approached the Plaintiff, identified himself as a security guard and asked the Plaintiff to step into the Security Room. (*Id.* at 7-8). The Plaintiff allegedly began screaming, ran back into the store, throwing the items out of his coat pocket as he ran. (*Id.* at 8). The items were later identified as two tubes of toothpaste, jello and a jar of baby food.

Vaughn then took Plaintiff into the Security Room and called the Chicago police. Defendant, Officer Frank Cosgrove ("Cosgrove") and Defendant, Officer Joseph Schmit ("Schmit") responded to the call. After allegedly interviewing several Jewel employees and other witnesses, the Defendants Cosgrove and Schmit placed the Plaintiff under arrest. (*See* Defendant's Memorandum in Support of Summary Judgment, Ex. 6). Based upon these events, criminal charges were brought against the Plaintiff in the Circuit Court of Cook County. At the close of the State's evidence in the criminal trial, a directed verdict was granted in favor of Gramenos. *Id.*, Ex. 1 at 31.

Pursuant to the arrest, the Defendant Vaughn signed a complaint against Gramenos. On the complaint, it states that the complainant's signature was subscribed and sworn to before the Defendant, Sergeant Heatly ("Heatly"). The Plaintiff maintains that Vaughn never appeared before

¹ Exhibit 1 is a transcript of the criminal proceedings in the Circuit Court of Cook County.

Heatly, therefore the complaint violated Ill.Rev.Stat., ch. 38, § 111-3(b).²

The Plaintiff claims that his prosecution by an improperly verified complaint violates his right to due process of law under the Fourteenth Amendment and that this gives rise to an action under 42 U.S.C. § 1983. (Plaintiff's Amended Complaint, Count I). The Plaintiff also alleges the Defendant police officer did not have probable cause to arrest him since they did not conduct an independent investigation. The Plaintiff further alleges that the police subjected him to an unreasonable search and seizure and that they deprived him of his property without due process of law.

As a separate cause of action against Jewel and Vaughn under § 1983, the Plaintiff alleges that the practice of signing a complaint without appearing in person indicates "the existence of a concerted and customary plan of action whereby Defendant Jewel is permitted by the Chicago Police Department to cause the arrest and prosecution of suspected shoplifters without the necessity of complying with procedur(al) safeguards ordinarily required in such circumstances." (Plaintiff's Amended Complaint, ¶ 22).

The Plaintiff seeks judgments against the three members of the Chicago Police Department for \$100,000 and against Jewel and Vaughn for \$100,000.

I. MOTION FOR SUMMARY JUDGMENT.

Summary judgment shall not be granted unless the record reveals "that there is no genuine issue of material

² This section requires a criminal complaint "to be sworn to and signed by the complainant."

fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden of showing the propriety of summary judgment relief rests with the movant. *First Nat'l Bank Co. of Clinton, Illinois v. Insurance Co. of North America*, 606 F.2d 760 (7th Cir. 1979). All inferences that may be drawn from the evidence shall be drawn in favor of the party against whom summary judgment relief is sought. *Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 (7th Cir. 1976). When, however, a summary judgment movant has made a threshold showing of the propriety of summary judgment, the adverse party may not defeat the motion by merely relying upon the allegations or denials of his pleadings. Fed.R.Civ.P. 56(e); *First National Bank*, 606 F.2d at 767.

II. IMPROPER VERIFICATION OF THE COMPLAINT.

Even though the complaint against the Plaintiff in the criminal action may have been improperly verified, the Plaintiff has failed to show that this is a federal constitutional right cognizable under § 1983 action. The Illinois Supreme Court has specifically held that there is no constitutional requirement for verification of a complaint. See *People v. Audi*, 75 Ill.2d 535, 537, 389 N.E.2d 534 (1979); *People v. Harding*, 34 Ill.2d 475, 481-82, 216 N.E.2d 147 (1966). Further, the requirement that the complaint be sworn to and signed by the complainant can be waived and is waived by proceeding to trial. *People v. Bradford*, 62 Ill.2d 21, 22, 388 N.E.2d 182 (1975).³ In the case at

³ "We therefore find that the Defendant by proceeding to trial without objecting or raising the question waived any defects that allegedly existed in the verification of the complaint." *Bradford* at 22.

bar, the Plaintiff did not object to the improper verification of the complaint until after the close of the State's evidence, thereby waiving any defects. (Defendant's Memorandum in Support of Summary Judgment, Ex. 1 at 31).

Further, as the Defendants indicate, the purpose of the complaint is to give notice to the Defendant of the nature and elements of the crime charged in order to enable the Defendant to properly present a defense. *See People v. Puleo*, 96 Ill.App.3d 457, 421 N.E.2d 367 (1st Dist. 1981). There is no argument that the Plaintiff was not aware of the exact nature of the charges against him or that he could not properly present a defense. Thus, the Plaintiff has failed to establish that the allegedly improper verification deprived him of any federally protected constitutional rights.

III. PROBABLE CAUSE FOR THE ARREST.

The Plaintiff spends over fifty pages in his reply brief discussing his apparent belief that the Defendants did not have probable cause to arrest him. Although it is not specifically alleged in his amended complaint, apparently his argument is that his arrest was based solely upon the form complaint signed by Vaughn. The Plaintiff alleges that this was insufficient to establish probable cause violating his Fourth Amendment rights.

Plaintiff's claim is unfounded. Probable cause to arrest may be found upon the observations of the party signing the complaint alone. *See, e.g., People v. Foss*, 18 Ill.App.3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974). However, in the case at bar, it is uncontradicted that the police officers conducted an independent investigation to determine whether there was probable cause to arrest the Plaintiff. Two shoppers at Jewel stated by deposition that they saw

Gramenos place merchandise in his coat pocket and that they later gave statements to officers Schmitt and Cosgrove. (Defendants' Memorandum in Support of Summary Judgment, Ex. 7 & 8). Despite the fact that there may be some discrepancies in the depositions of the various witnesses and officers, it is uncontradicted that the officers did independently interview and investigate the facts leading to Plaintiff's arrest. Since there was probable cause for the arrest, the search and seizure of the Plaintiff was not unreasonable.

IV. COUNT II—§ 1983 ACTION AGAINST JEWEL AND VAUGHN.

Ordinarily § 1983 actions may not lie against private parties, such as Jewel and Vaughn, but only against state agents acting under color of state law. The only exception to this rule is when private citizens enter into a concerted action with state officers to bring about a specific chain of events. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978).

Courts have found state action when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments. *See El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980); *Smith v. Brookshire Bros., Inc.*, 519 F.2d 93 (5th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977).

However, to find state action, the merchant must act in accordance with a pre-existing plan between merchant and police, and the plan's context must involve the merchant's exercise of functions exclusively reserved to the State. *Klimzak v. City of Chicago*, 539 F.Supp. 221, 223 (N.D. Ill. 1982); *Davis v. Carson Pirie Scott & Co.*, 530

F.Supp. 799 (1982). Where the police conduct an investigation following private complaints, the private complainant is not a state actor. *Davis* at 802. Further, mere arrest after detention by store detectives will not suffice to constitute state action. *Id.*

In the case at bar, it has already been established that the police conducted an independent investigation. As the court noted in *Davis*, "a 'customary practice' of police investigation following private complaints clearly does not make the private complainant a state actor." *Id.*

The Plaintiff's unsupported allegations may not survive a motion for summary judgment. See *First Nat'l Bank Co. of Clinton, Ill. v. Insurance Co. of North America*, 606 F.2d 760, 767 (7th Cir. 1979). Further, the Plaintiff's unverified exhibits attached to his reply memorandum do not raise a genuine issue of material fact.³ The exhibits totally fail to show any existence of a plan between the Defendants whereby the merchant exercised functions exclusively reserved to the State.

For the reasons stated herein, IT IS RECOMMENDED that the court GRANT the Defendants' motions for summary judgment.

Respectfully submitted,

/s/ JAMES T. BALOG
United States Magistrate

DATE: JUNE 25, 1985.

³ Because it has been recommended that the court grant summary judgment, it need not rule upon the Defendants' motions to strike.

App. 28

The parties may serve and file written objections to this Report and Recommendation within ten (10) days hereof.

Copies have, this date, been mailed to:

JAMES A. STAMOS
69 West Washington Street
Chicago, Illinois 60602
Attorney for Plaintiff

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Chicago, Illinois 60606
Attorney for Jewel Tea Co.
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Attorney for Defendants
Schmit and Cosgrove

DARKA PAPUSHKEWYCH
Asst. Corp. Counsel
Room 511, City Hall
121 North LaSalle Street
Chicago, Illinois 60602
Attorney for Defendant

40-4
(Court Branch)
22-Feb-80.
(Court Date)

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

CCMC1-225 MISDEMEANOR

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois
Plaintiff

COMPLAINT

v. No. _____

JAMES GREENEVAS
Defendant

(AGENT FOR JEWEL FOOD INC) complainant now appears before
(Complainant's Name Printed or Typed)

The Circuit Court of Cook County and states that

JAMES GREENEVAS (defendant) has on or about _____

12-Feb-80 at 1210 N Clark (place of offense)

committed the offense of RETAIL THEFT in that he

KNOWINGLY TOOK POSSESSION OF,
AND CARRIED AWAY MERCHANDISE DISPLAYED,
HELD, STORED OR OFFERED FOR SALE IN A RETAIL.
MERCANTILE ESTABLISHMENT JEWEL FOOD, WITH THE
INTENTION OF RETAINING SUCH MERCHANDISE WITH THE
INTENTION OF DEPRIVING SAID JEWEL FOOD INC
PERMANENTLY OF THE POSSESSION, USE OR BENEFIT
OF SUCH MERCHANDISE WITHOUT PAYING.

in violation of Chapter 38 Section 16A-3.

ILLINOIS REVISED STATUTES

James Vaughn - app.
(Complainant's Signature)
1210 N Clark 944-6950
(Complainant's Address) (Telephone No.)

STATE OF ILLINOIS)
COUNTY OF COOK) ss. James Vaughn
(Complainant's Name Printed or Typed)

being first duly sworn, on HIS oath, deposes and says that he has read the foregoing complaint by him
subscribed and that the same is true.

Subscribed and sworn to before me 12-Feb-1980
(Complainant's Signature)

Edith A. Smith
(Judge or Clerk)

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am
satisfied that there is probable cause for filing same. Leave is given to file said complaint.

Summons issued, Judge _____
or
Warrant Issued, Bail set at _____
Judge _____

or
Bail set at _____
85-2767
United States
Court of Appeals
Plaintiff's
EXHIBIT #1.
(Record 38 Ex. 1) •